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April 14, 2004

COURIER

Mr. Bradley A. Smith, Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: **MUR 5367**

Dear Chairman Smith:

On behalf of Respondent Representative Darrell Issa, we hereby respond to the Commission's finding that there is reason to believe he violated 2 U.S.C. § 4411(e)(1)(B). As an initial matter, we disagree with the Commission's reading of the new law, which is based on the apparent belief that a Federal officeholder running for governor in an off-year recall election that involved no Federal Election Activity is prohibited from taking steps in a state election to strengthen his state candidacy. Such a result, especially in the unique circumstances of the California Governor's recall election, was not the intent of the Bipartisan Campaign Reform Act (BCRA) and Mr. Issa's actions here in no way touch upon the concerns expressed by its proponents.

Facts

This is a matter of first impression under BCRA, since it involves the prohibition on Federal officeholders raising and spending state dollars in the context of unique state election procedures in which the Federal officeholder was a candidate for state office. This matter revolves around an off-year California recall and replacement election on the same date -- October 7, 2003 -- long before any state election activity could also be construed as Federal Election Activity. Unlike recall procedures in all other states where the recall election is conducted first and a replacement election held on another day only if the recall proves successful, California schedules the recall and replacement election on the same day. Any candidate, therefore, who wishes to replace an officeholder subject to a recall must of necessity simultaneously work to effect the successful recall if the candidate's replacement election campaign is to be anything more than irrelevant political trivia. A candidate spending money to recall an officeholder is, therefore, *for BCRA purposes*, part and parcel of the state candidate's own campaign.

Benjamin L. Ginsberg
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This matter also involves the funding of state election activity by an S Corporation, the sole shareholder and directors of which are the Federal officeholder/state candidate and his wife. Moreover, the funds used by the S Corporation to make contributions for the state election activity were transferred to it from the personal account of the state candidate. In such a limited scenario, the funds so used are effectively the funds of the state candidate.

1. California's recall "measure", which occurred simultaneously with the replacement election, was, for BCRA purposes, an election, and Governor Davis was a candidate and Rescue California was affiliated with Darrell Issa's candidate committee. While California bifurcates, *for contribution limits purposes*, a simultaneous recall "measure" and replacement election, California Fair Political Practices Commission (FPPC) Fact Sheet, *Recall Elections*, <http://www.fppc.ca.gov/library/recallfactsheet.pdf>, the Constitution does not mandate this result and BCRA does not incorporate this logic. In analyzing the Federal Election Campaign Act (FECA or the Act) in light of BCRA, there is no requirement to consider the recall and gubernatorial vote as separate elections and, *for BCRA purposes*, they are one and the same.¹ The FEC, therefore, is not bound by these state-conferred labels. In fact, California is the only state to distinguish a "recall" from any other election for purposes of imposing contribution limits.

The Supreme Court in Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), upon which the FPPC paradoxically relies (Fact Sheet at ¶11), distinguished between contributions to candidates (which can be limited) and those made to ballot measures (which cannot be limited) because "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Id.* at 298 (citations omitted). California's counterintuitive statutory scheme governing its recall process is not consistent with BCRA and should not serve as authority for the Commission in its initial case implementing this section of BCRA. While California has ironically chosen to view expenditures by committees that either support or oppose the recall of an officeholder as expenditures on "issue" advocacy, *see* FPPC Fact Sheet at ¶ 1, the contrary conclusion is more consistent with BCRA and U.S. Supreme Court precedent. Common sense must acknowledge that if corruption or its appearance is at risk when large contributions are made to candidates in a regularly scheduled election, this risk is just as present when large contributions are made to committees affiliated with the officeholder subject to a recall and to committees supporting a recall that are affiliated with replacement candidates, both of which,

¹ The FPPC acknowledges that local jurisdictions can impose contribution limits on officeholders subject to a recall, *id.* at ¶ 6, implicitly agreeing that it is constitutional to treat recall elections as candidate elections.

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under California law, can receive unlimited contributions from any source. Fact Sheet at ¶¶ 2, 12.²

Consequently, if the recall could have constitutionally been labeled an election, California could have labeled Governor Davis a “candidate” and imposed contribution limits. Moreover, *Rescue California*, which Darrell Issa did finance in significant part, was affiliated with his candidate committee (if evaluated under FEC affiliation criteria). This fact by itself brings Respondents within the 2 U.S.C. § 441i(e)(2) exemption. The fact that the California constitution prevents an officeholder who is the subject of a recall from participating in the replacement portion of the election does not change the obvious conclusion that California could have treated Governor Davis as a candidate during the recall portion of the election, and a committee supporting the recall that is affiliated with a replacement candidate could have been regarded as an affiliated candidate committee. For *BCRA* purposes, therefore, Governor Davis was a candidate and *Rescue California* was affiliated with *Issa for Governor*.

2. Even if Governor Davis cannot be considered a candidate, Darrell Issa met the exemption in 2 U.S.C. § 441i(e)(2) because *Rescue California*’s ads referred only to the “relevant state or local office.”

BCRA’s ban on Federal candidates and officeholders soliciting and spending soft money for state elections was described by the Supreme Court in *McConnell v. FEC* as an “anticircumvention measure[]” so that candidates and officeholders “could [not] easily avoid the FECA’s contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities.” Slip. Op. at 75 (emphasis added). With this view in mind, the Court described the § 441i(e)(2) exemption as requiring the Federal officeholder’s/state candidate’s ads to refer to “the relevant state or local office.” *Id.* at 73 n.70. As the Complainant points out, *Rescue California*’s ads made such a limited reference.

² To be specific, large contributions made to *Californians Against the Costly Recall of the Governor* (the committee affiliated with the former incumbent governor to oppose the recall) had just as much potential to corrupt Governor Davis or evidence the appearance thereof as they would if given to his candidate committee, the *Governor Gray Davis Committee*, in a regularly scheduled election. Likewise, large contributions to *Arnold Schwarzenegger’s Total Recall Committee, Vote Yes* (the committee affiliated with the eventual replacement candidate to support the recall) had just as much potential to corrupt Arnold Schwarzenegger or evidence the appearance thereof as would large contributions to *Californians for Schwarzenegger* (Arnold Schwarzenegger’s candidate committee). The same is true of *Californians for Stability – No on the Governor’s Recall* (the committee affiliated with the Lt. Governor to oppose the recall) and *Friends of Cruz Bustamante* (the Lt. Governor’s candidate committee).

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What matters, therefore, is that the Federal officeholder be a candidate for state or local office and that his spending on behalf of that candidacy not be used as a proxy to raise and spend money on Federal Election Activity, but rather to advance the Federal officeholder's state candidacy. Congress in drafting 2 U.S.C. § 441i(e)(2) and the Commission in promulgating regulations implementing this section most assuredly did not contemplate California's bifurcated, unique and counterintuitive labels relative to its recall and replacement procedures. All we ask is that the Commission not apply BCRA's anticircumvention measure beyond its purpose.

3. Even if the recall portion of the recall election is not viewed as an election, 2 U.S.C. § 441i(e)(2) cannot be constitutionally applied to prevent a Federal candidate or officeholder from being involved in otherwise lawful state issue or candidate advocacy so long as funds raised and spent are not used for Federal Election Activity.

As mentioned above, BCRA's prohibition on Federal candidates and officeholders raising and spending soft money for state elections was to prevent state election activity from being used as a proxy to raise and spend funds for Federal Election Activity. For example, Advisory Opinion 2003-12 (Flake) involved state activity on behalf of a state ballot initiative voted on in the same election that a Federal candidate appeared on the ballot. Where this is not a possibility, 2 U.S.C. § 441i(e)(2) cannot be applied to deny Federal candidates and officeholders their right to engage in otherwise lawful state election activity.

"When the Government burdens the right to contribute, [the Supreme Court appl[ies] heightened scrutiny." McConnell, *id.* at 10. The Court asks "whether there is a 'sufficiently important interest' and whether the statute is 'closely drawn' to avoid unnecessary abridgement of First Amendment freedoms." *Id.* While the Government has a recognized interest in preventing Federal candidates and officeholders from using state election activity as a proxy to raise and spend soft money on Federal Election Activity, applying 2 U.S.C. § 441i(e)(2) beyond this targeted conduct to prevent them from engaging in pure state election activity violates the First Amendment rights of Federal candidates and officeholders.

Rescue California did not in any way serve as a vehicle for Darrell Issa to raise donations for Federal Election Activity, which is especially obvious given the fact that the recall/replacement election was an isolated event in 2003. *Rescue California* did not participate, nor was it possible to involve itself (because of the timing of the recall), in (1) voter registration activity within 120 days of a regularly scheduled Federal election or (2) get-out-the-vote activity; voter identification or public communications referring to a clearly identified Federal candidate that promotes, supports, attacks or opposes a Federal candidate, all in connection with an election in which a Federal

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candidate appears on the ballot.³ *Rescue California* raised and spent funds to get the recall of Governor Davis on a special recall election ballot and to advocate Governor Davis' recall. If it had engaged in Federal Election Activities, Mr. Issa's funding of *Rescue California* would clearly have been illegal under 2 U.S.C. § 441i(e)(2). Therefore, Mr. Issa's funding of *Rescue California* in no way violated BCRA's purpose. To apply this section of BCRA beyond its targeted conduct in this unique situation is to apply it in an overbroad manner.

4. 2 U.S.C. § 441i(e)(1) cannot be applied to a corporation organized under Subchapter S of the Internal Revenue Code, where the sole shareholder is the candidate and his wife, and whose own personal funds were transferred to the S Corporation to fund the state election activity at issue. Respondent acknowledges that in MURs 3119 and 3191 the Commission refused to distinguish contributions to a Federal candidate in a Federal election by an S Corporation for purposes of 2 U.S.C. § 441b. This situation is different. BCRA's purpose is to stop Federal officeholders from soliciting and, therefore, being influenced by prohibited sources. This scenario did not arise here because Mr. Issa funded state election activity through his own S Corporation. We respectfully ask the Commission to distinguish these matters from the present facts where there is one shareholder, the candidate and his wife,⁴ and where the shareholder's personal assets funded the corporation for the purpose of funding the state election activity at issue. In other words, the use of Greene Property funds did not involve soliciting prohibited sources. In such a limited case, the funding of the state election activity should be considered, for BCRA purposes, the personal funds of the sole shareholder.

In Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), the Supreme Court justified a state ban on corporate expenditures, not on the basis of a threat of *quid pro quo* corruption but on the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" Id. at 660. These advantages granted by state law include "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets — that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." Id. at 658-59.

³ In California, disbursements on voter identification, get-out-the-vote and generic voter drives did not constitute Federal Election Activity until December 5, 2003, some two months after the state election at issue. FEC Guide to Reporting Coverage Periods for Federal Election Activity in Connection with 2004 Elections, http://www.fec.gov/pages/bcra/rulesmakings/charts_fca_dates.htm

⁴ Darrell Issa and his wife are the single shareholder of their S Corporation under the Internal Revenue Code. See Instructions for IRS Form 2553, <http://www.irs.gov/pub/irs-pdf/i2553.pdf>

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In the case of an S Corporation owned by a sole shareholder/candidate, who has transferred personal funds into his S Corporation for the purpose of financing state election activity, these funds spent by the S Corporation should be considered the personal funds of the candidate for BCRA purposes. In this instance, the state conferred advantages are of no consequence to the aggregation of wealth used for state election purposes. The aggregation takes place before being transferred to the S Corporation.

Mr. Issa's personal funds made contributions from his S Corporation to *Rescue California* possible. In the three months before Greene Properties first transferred funds to *Rescue California*, Darrell Issa transferred \$505,000 in personal funds to Greene Properties. **Attachment A** (Greene Properties bank statement). Finally, while page five of the Factual and Legal Analysis shows the dates of Green Properties' donations to *Rescue California*, below is a chart showing a same-day connection between transfers from Darrell Issa personally to Greene Properties and then most of the contributions made by Greene Properties to *Rescue California*.

From Darrell Issa to Greene Properties		From Greene Properties to <i>Rescue California</i>	
Date	Amount	Date	Amount
2/13/03	\$355,000		
3/24/03	\$150,000		
		5/08/03	\$100,000
		5/19/03	\$100,000
5/23/03	\$347,000	5/23/03	\$245,000
5/30/03	\$200,000	5/30/03	\$200,000
6/05/03	\$155,000	6/05/03	\$155,000
6/10/03	\$200,000	6/10/03	\$200,000
6/13/03	\$150,000	6/13/03	\$150,000
6/20/03	\$130,000	6/20/03	\$130,000
6/24/03	\$250,000	6/24/03	\$250,000
7/02/03	\$180,000	7/02/03	\$180,000
7/14/03	\$50,000	8/04/03	\$50,000
	\$2,167,000	Total	\$1,760,000

This chart demonstrates that Darrell Issa and wife used their S Corporation as the vehicle to direct already aggregated personal funds to *Rescue California*; the corporation was not used as a vehicle to first aggregate wealth and then make contributions. In this limited instance, therefore,

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the purpose of the corporate contribution ban is not present and should not be applied to Respondent.

4. Darrell Issa did not solicit any funds for *Rescue California* in violation of the Federal limits or source prohibitions. The Factual and Legal Analysis (FLA) mentions that Mr. Issa met with a Mr. Gamel, who later donated \$10,000 to *Rescue California*. Tal Cloud, the person who initiated and arranged this meeting that involved Mr. Gamel, observed that Mr. Issa did not solicit any funds and left the room and was not involved in the raising of funds. Tal Cloud Aff. (Attachment B).

The FLA also mentions that the President of the Lincoln Club of Orange County, Michael Capaldi, met with Darrell Issa and that the Club later donated \$81,350 to *Rescue California*. William Johns, the person who initiated and arranged this meeting of potential recall supporters that involved Mr. Capaldi, observed that Mr. Issa stipulated to the attendees that because of the BCRA, he could only ask for \$2,000 from individuals. Like the meeting convened by Tal Cloud, Darrell Issa also left the room when fundraising was discussed. William Buck Johns Aff. (Attachment C).

The FLA also briefly mentions reports that the Morongo Indian Tribe met with Mr. Issa but never made a donation. The Tribal Chairman of the Morongo Band of Mission Indians, Maurice Lyons, who initiated the meeting and was present, observed Darrell Issa mention that he could not ask for more than \$2,000 from individuals and, again, left the room when the Tribal Council discussed fundraising. Maurice Lyons Affidavit. (Attachment D).

Finally, Darrell Issa himself flatly denies soliciting a donation from a corporation or for more than \$2,000 from individuals as he qualified any fundraising discussions with the proviso that because of Federal campaign finance law restrictions he was not asking for more than \$2,000 from individuals. Rep. Darrell Issa Aff. (Attachment E). More supporting affidavits may be filed shortly.

Accordingly, Mr. Issa did not solicit any funds for *Rescue California* outside the limits and sources of Federal law.

Conclusion

In this case of first impression in unique circumstances, the Commission should not place form over substance. "As a practical matter" Governor Davis was a candidate and *Rescue California* was affiliated with Darrell Issa's candidate committee in every relevant sense for BCRA purposes, notwithstanding California's unique policy of treating officeholders subject to a recall and

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committees supporting the recall differently from the candidates vying to replace the officeholder.

Concomitantly, even if Governor Davis cannot be considered a candidate with respect to the recall portion of the recall election, and *Rescue California* cannot be considered affiliated with Darrell Issa's candidate committee, *Rescue California* spent no money on Federal Election Activity, the entire reason behind BCRA's prohibition on Federal officeholders raising and spending soft money in state elections. Therefore, in this limited scenario, BCRA cannot be applied to prevent a Federal officeholder from participating in lawful state candidate activity or issue advocacy.

In addition, an S Corporation owned by a single shareholder/candidate and whose personal funds transferred to the S Corporation were the source of the contributions to the state committee must be considered the personal funds of the state candidate for BCRA purposes.

Finally, as is clear from the attached affidavits, Darrell Issa never solicited funds for *Rescue California* outside the limits and prohibitions of Federal law.

For the foregoing reasons, this matter should be dismissed. All that is asked for from the Commission is a little common sense.

Sincerely,



Benjamin L. Ginsberg



Glenn M. Willard

BEFORE THE FEDERAL ELECTION COMMISSION


Respondent Rep. Darrell Issa

MUR 5367

Affidavit of Tal Cloud

1. I am Tal Cloud, President of Paper Pulp & Film, which is located in Fresno, California.
2. As the movement to recall Gov. Davis was already underway and moving forward, I wanted to assist the efforts, primarily through raising funds.
3. In furtherance of this goal, I approached local business owners I knew as friends who shared my views of needed change in Sacramento.
4. On my initiative, I arranged meetings with people who I believed might be likely to get involved. This included Dan Gamel, a local recreational vehicle dealer.
5. On May 17, 2003, I convened a meeting that involved Dan Gamel, Rep. Issa and others.
6. During the meeting, Rep. Issa stated that, according to the new election laws, he could not directly solicit a specific amount of money for the recall.
7. During the meeting, Mr. Gamel asked, "How much do you want from me?" (or to that effect). Rep. Issa was very clear that he could not ask for money and he never did.
8. Rep. Issa at this point left the room, and was not further involved in the raising of funds.


I hereby swear that all statements herein are true.

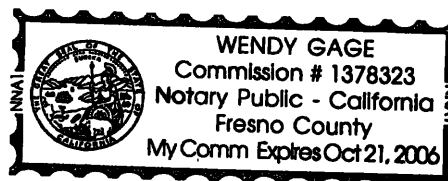

Tal Cloud

State of California

Signed and sworn to before me this 30th day of March __, 2004.

NOTARY PUBLIC
My commission expires:





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ATTACHMENT B

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BEFORE THE FEDERAL ELECTION COMMISSION

Respondent: Rep. Darrell Issa

MUR 5367

Affidavit of William Buck Johns

1. I am William Buck Johns III, owner of Inland Group, Inc., which is located in Newport Beach, California.
2. During the early months of 2003, I decided I wanted to support the still-developing recall of Gov. Gray Davis.
3. Signatures were already being gathered, and I was familiar with the fact that Darryl Issa was supporting the recall effort. I desired for others to assist the effort, and asked Mr. Issa to provide an update on the recall in Orange County.
4. I convened a meeting on May 2, 2003 in the conference room of my business where about 8-10 people attended. I specifically invited individuals who I believed would be likely to support the recall, including Michael Capaldi, President of the Lincoln Club of Orange County.
5. At this meeting, Darryl Issa provided an update on the recall effort, the likelihood of success, etc., answered questions asked of him by attendees and asked for the attendees to support the recall.
6. Mr. Issa also included this stipulation: because of campaign finance laws he could not solicit donations in violation of the BCRA.
7. Darryl Issa mentioned that because of the BCRA, he could ask for \$2,000 from individuals, and left it to others if they wanted to contribute.
8. At that point, Mr. Issa left the room and the group discussed, outside of his presence, what it might contribute.

I hereby swear that all statements herein are true.

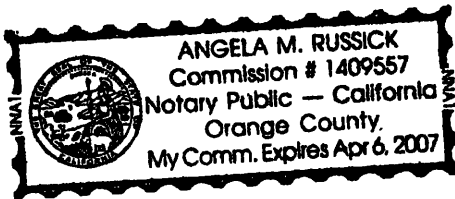

William Buck Johns

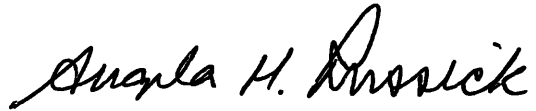
State of California

Signed and sworn to before me this 30th day of March __, 2004.

NOTARY PUBLIC

My commission expires:





BEFORE THE FEDERAL ELECTION COMMISSION

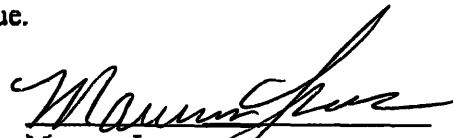
Respondent Rep. Darrell Issa

MUR 5367

Affidavit of Maurice Lyons

1. I am Maurice Lyons, Tribal Chairman of the Morongo Band of Mission Indians in Cabazon, CA.
2. In May, 2003 the Tribe was interested in contributing to the effort to obtain sufficient signatures to place the recall of the Governor on the ballot.
3. I, therefore, initiated a meeting of the Tribal Council on May 3, 2003 with Darrell Issa for the purpose of gauging the seriousness of the recall effort.
4. At this meeting, Mr. Issa explained the status of the recall effort and answered our questions.
5. Mr. Issa mentioned that because of campaign finance law restrictions, he could not ask for more than \$2,000 from individuals.
6. Darrell Issa excused himself from the room when Tribal Council members discussed whether and how much the Tribe would contribute to the recall effort.

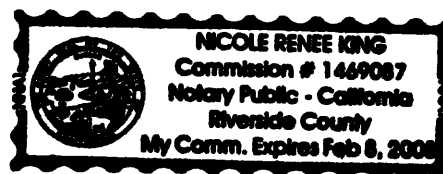
I hereby swear that all statements herein are true.


Maurice Lyons

State of California

Signed and sworn to before me this 13 day of April, 2004.



NOTARY PUBLIC
My commission expires:

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ATTACHMENT D

25044124239

BEFORE THE FEDERAL ELECTION COMMISSION

Respondent Rep. Darrell Issa


MUR 5367

Affidavit of Rep. Darrell Issa

1. I am Congressman Darrell Issa and represent California's 49th congressional district.
2. In 2003, I was a supporter of the campaign to recall Governor Gray Davis and was also a candidate for Governor of California in the recall election.
3. As a supporter of the recall campaign, I participated in several meetings in May, 2003 with potential supporters of the recall effort.
4. At these meetings, I provided an update on the status of the signature collection effort to put the recall question on the ballot and answered related questions.
5. When monetary contributions to the recall effort were discussed at these meetings, I mentioned that because of campaign finance law restrictions, I was not asking for more than \$2,000 from individuals. I never asked a person to make a donation in excess of \$2,000 nor did I ever solicit a contribution from a corporation.
6. I also conscientiously did not participate in any discussions regarding contributions for the recall effort.

I hereby swear that all statements herein are true.

CITY OF JERUSALEM
CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

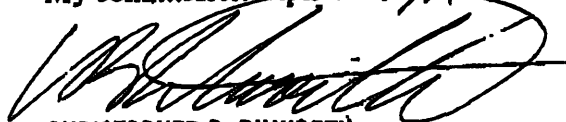

Rep. Darrell Issa

State of California

Signed and sworn to before me this 14th day of April, 2004.

NOTARY PUBLIC

My commission expires N/A


CHRISTOPHER R. DILWORTH
CONSULAR ASSOCIATE
UNITED STATES OF AMERICA

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ATTACHMENT E

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